IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-15192

STEWART & JASPER ORCHARDS et al.,

Plaintiffs-Appellants,

v.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, et al.,

Federal Defendants-Appellees,

and

The NATURAL RESOURCES DEFENSE COUNCIL and THE BAY INSTITUTE,

Intervenors-Defendants-Appellees.

FEDERAL APPELLEES' ANSWERING BRIEF

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APA	Administrative Procedure Act
BiOp	Biological Opinion
CVP	Central Valley Project
ER	Excerpts of Record
ESA	Endangered Species Act
FWS	U.S. Fish & Wildlife Service
ITS	Incidental Take Statement
OCAP	Long-Term Central Valley Project Operations Criteria and Plan
RPA	Reasonable and Prudent Alternative
SER	Federal Appellees' Supplemental Excerpts of Record
SWP	State Water Project

JURISDICTIONAL STATEMENT

The complaint filed by Plaintiffs-Appellants Stewart & Jasper Orchards et al. (collectively, the "Stewart Appellants") alleged that the district court had jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), 2201 & 2202, and 5 U.S.C. § 702. ER 336.[1/] Its sixth claim brought as-applied challenges to sections 7 and 9 of the Endangered Species Act ("ESA") as exceeding Congress' Commerce Clause power. ER 352. The district court correctly held that it lacked jurisdiction over the section 9 claim, both because the Stewart Appellants had failed to establish standing and because the challenge was unripe. ER 27. It granted summary judgment for the Defendants-Appellees and Intervenors-Defendants-Appellees on the merits of the section 7 claim, ER 59, but that claim has been waived, *see infra* at 26–27. This Court has appellate jurisdiction over the district court's final decision granting summary judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In 2008, the U.S. Fish & Wildlife Service ("FWS") issued a biological opinion ("BiOp") that concluded continued operation of certain federal and state water diversion operations in California was likely to jeopardize the continued existence of the delta smelt, a fish found only in California and listed as threatened

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[1/] "ER" refers to the Excerpts of Record. "SER" refers to the Federal Appellees' Supplemental Excerpts of Record.

under the ESA. This appeal concerns the Stewart Appellants' claim that the ESA, as applied to the water diversion operations through the 2008 BiOp, is beyond the scope of Congress' Commerce Clause power. The following issues are presented:

1. The Stewart Appellants declined to advance section 7 of the ESA—which requires federal agencies to ensure through consultation that their actions do not jeopardize the continued existence of listed species—as a basis for summary judgment. Instead, they relied on section 9—which prohibits the "take" of endangered species—notwithstanding an inability to point to any concrete, imminent imposition of liability under section 9.

   a. Does their failure to point to any imminent application of section 9 prevent the Stewart Appellants from establishing Article III standing to bring an as-applied challenge to section 9?

   b. Is the Stewart Appellants' as-applied challenge to section 9 ripe?

   c. Have the Stewart Appellants waived an as-applied challenge to ESA section 7 by abandoning such a claim on summary judgment?

2. Is application of the ESA's protections to water diversion operations, through the 2008 BiOp concerning their effects on the delta smelt, a valid exercise of the Commerce Clause power?

STATEMENT OF THE CASE

I. The Endangered Species Act

A. Purposes of the ESA

Finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," 16 U.S.C. § 1531(a)(1), Congress enacted the ESA, 16 U.S.C. §§ 1531–1544, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species," *id.* § 1531(b). The Supreme Court's review of the "language, history, and structure of the [ESA]" convinced it "beyond doubt" that "Congress intended endangered species to be afforded the highest of priorities," and that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978) (emphasis added).

1. Preservation of Species' Known and Unknown Scientific and Commercial Value

Congress found that many of the species threatened with extinction are of "scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The House Report accompanying the statute noted that many species faced extinction

due to "the pressures of trade," and that "as we increase the pressure for products that they are in a position to supply . . . we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable." H.R. Rep. No. 93-412, at 2, 4 (1973). Congress explained that "it is in the best interests of mankind to minimize the loss of genetic variations," because they are "potential resources." *Id.* at 5; *see also id.* (citing example of plant that permitted discovery of means to synthesize chemicals critical to regulation of human ovulation, and noting that other species could provide "potential cures for cancer and other scourges, present or future"). In enacting a predecessor statute, Congress had likewise "expla[ined] . . . the commercial value of preserving Earth's biodiversity." *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1997). *See* S. Rep. No. 91-526, at 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415 ("[W]ith each species we eliminate, we reduce the pool of germ-plasm available for use by man in future years."); *see also* 119 Cong. Rec. 25,668 (1973) (statement of Sen. Tunney) ("[T]o allow extinction of animal species is ecologically, economically, and ethically unsound.").

2. Protection of Species' Roles Within Interdependent Ecosystems and Food Webs

Beyond the "need for biological diversity for scientific purposes," Congress was also aware "that many of these animals perform vital biological services to

maintain a 'balance of nature' within their environments." S. Rep. No. 93-307, at 1 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990; *see also Hill*, 437 U.S. at 178–79 ("Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet."); H.R. Rep. No. 93-412, at 6 (discussing recent awareness of "the critical nature of the interrelationships of plants and animals between themselves and with their environment"); S. Rep. No. 91-526, at 3, *reprinted in* 1969 U.S.C.C.A.N. at 1415 ("[T]he gradual elimination of different forms of life reduces the richness and variety of our environment and may restrict our understanding and appreciation of natural processes.").

3. Recovery of Species' Commercial and Economic Value

Finally, Congress noted that, "[f]rom a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed." S. Rep. No. 91-526, at 3, *reprinted in* 1969 U.S.C.C.A.N. at 1415; *see also* H.R. Rep. No. 93-412, at 6 (noting that species' value "should encourage [countries] to maintain healthy and viable stocks of these animals as a resource").

B. Pertinent Mechanics of the ESA

While the ESA is "the most comprehensive legislation for the preservation

of endangered species ever enacted by any nation," *Hill*, 437 U.S. at 180, this brief focuses on three essential elements of its regulatory scheme.

1. Listing

Section 4 provides for listing species as "threatened" or "endangered," if warranted, as well as for designation of their "critical habitat." 16 U.S.C. § 1533(a); *see also id.* § 1532(5), (6) & (20) (defining terms). The National Marine Fisheries Service and FWS[2/] "shall determine" whether to list species as threatened or endangered based upon five factors, including "overutilization for commercial, recreational, scientific, or educational purposes," *id.* § 1533(a)(1)(B), with all listing decisions being made "solely on the basis of the best scientific and commercial data available," *id.* § 1533(b)(1)(A). The listing process is the "keystone of the Endangered Species Act." H.R. Rep. No. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810.

2. Section 9's "Take" Prohibition

Section 9 prohibits importing, exporting, "tak[ing]," possessing, selling, delivering, carrying, transporting, or shipping any listed species. *Id.*

[2/] Congress conferred responsibility for implementing the ESA on the Secretaries of the Interior and of Commerce. 16 U.S.C. § 1532(15). The Secretary of the Interior has entrusted his ESA responsibilities to FWS, and the Secretary of Commerce to the National Marine Fisheries Service.

§ 1538(a)(1).[3] "'[T]ake' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19); *see also* 50 C.F.R. § 17.3 (2008) ("Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."); *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 700 (1995) (upholding regulatory definition, partly through reliance on "Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife"). The take prohibition is "[t]he cornerstone" of the statute's "comprehensive regulatory scheme." *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000). Violations can incur civil and criminal penalties. *See* 16 U.S.C. § 1540(a)–(b).

3. Section 7 Consultation

Section 7 requires "[e]ach Federal agency [to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse

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[3] Textually, section 9's take prohibition only applies to endangered species. *See* 16 U.S.C. § 1538(a)(1). But ESA section 4(d) authorizes FWS to issue regulations prohibiting the take of threatened species, as well, *see id.* § 1533(d); FWS has done so, *see* 50 C.F.R. §§ 17.21(c) & 17.31(a) (2008).

modification of [critical] habitat of such species." *Id.* § 1536(a)(2). Jeopardy is likely if an action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species . . . ." 50 C.F.R. § 402.02 (2008); *see also id.* (defining adverse modification of critical habitat).

Whenever a proposed federal action "may affect" a listed species in either manner, the action agency (here, the Bureau of Reclamation), must consult with the appropriate expert wildlife agency (here, FWS). *Id.* § 402.14(a). To facilitate the consultation process, the action agency may prepare a biological assessment. *See* 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(a) (2008). If both agencies determine that the proposed action is not likely to affect listed species adversely, the process ends. 50 C.F.R. § 402.13 (2008); *see also id.* § 402.14(b)(1). This is "informal" consultation. But if either agency determines that the proposed action *is* likely to affect a listed species adversely, "formal" consultation begins, *id.* § 402.14, culminating in the issuance of a BiOp that sets forth the expert agency's determination of how the proposed action will affect the listed species, 16 U.S.C. § 1536(b)(3), including whether it is likely to cause jeopardy or adverse habitat modification, *id.* § 402.14(h)(3). Like a listing decision, a BiOp must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

If the BiOp concludes that jeopardy is likely, the expert agency suggests

reasonable and prudent alternatives ("RPAs") for the action agency to implement that would not cause jeopardy. *See ALCOA v. Bonneville Power Admin.,* 175 F.3d 1156, 1159 (9th Cir. 1999) (citing 16 U.S.C. § 1536(b)(3)(A)). It also issues an incidental take statement ("ITS") that prescribes terms and conditions in accordance with which the action should be carried out. *See* 16 U.S.C. § 1536(b)(4). If the action agency complies with the terms and conditions, take of listed species that occurs incidentally to the action is exempt from liability otherwise imposed by ESA section 9. *Id.* § 1536(o)(2); *see also Bennett v. Spear*, 520 U.S. 154, 170 (1997) (characterizing an ITS as "authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions,'" and noting that, while "[t]he action agency is technically free to disregard the [BiOp] and proceed with its proposed action, . . . it does so at its own peril," given the potential penalties for violations of ESA section 9).

Giving section 7 consultation primacy over federal agencies' substantive missions in this manner represents "an explicit congressional decision to require agencies to afford first priority to . . . saving endangered species." *Hill*, 437 U.S. at 185.

II. Factual Background

A. The Delta Smelt

The delta smelt is a 60–70-millimeter fish endemic to California's San

Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Delta"); though formerly one of the most common pelagic fish in the upper Sacramento-San Joaquin estuary, it is now restricted to the area from San Pablo Bay upstream through the Delta in Contra Costa, Sacramento, San Joaquin, Solano, and Yolo counties, with a range extending from San Pablo Bay upstream to Verona on the Sacramento River and Mossdale on the San Joaquin River. SER 30. It is the only smelt endemic to California, and the only true native estuarine species found in the Delta; it is adapted to living in fresh and brackish water, but rarely found in estuarine waters having more than ten-to-twelve parts per thousand of salinity (about one-third sea water). 58 Fed. Reg. 12,854, 12,854 (Mar. 5, 1993). Although the fish presently lacks known commercial uses, it was harvested as bait in the past, *see* SER 128, and may still be harvested "as a non-target by-catch in commercial bait fisheries for other baitfish species." *Id.* at 12,860. It is collected for scientific purposes, and may be prey for the introduced striped bass, a commercially valuable sport fish. *Id.*

In 1993, FWS listed the delta smelt as threatened under the ESA. *Id.* at 12,854. Its population had decreased by 90% in the previous twenty years, primarily because of "large freshwater exports from the Sacramento River and San Joaquin River diversions for agriculture and urban use." *Id.* The adverse effects of these projects had been aggravated by prolonged drought, introduced non-

indigenous aquatic species, reduction in abundance of key food organisms, and agricultural and industrial chemicals. *Id.* Critical habitat was designated in 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994). FWS stated that the designation would have numerous economic benefits, because it would "positively affect all components of the food web." *Id.* at 65,263. In 2010, FWS announced that further decline of the delta smelt population warranted increasing its listing status to endangered, but that such listing was precluded for the moment by higher-priority listing actions. 75 Fed. Reg. 17,667 (Apr. 7, 2010).

B. FWS' 2008 BiOp Evaluating the Effects of the Central Valley Project and State Water Project on the Delta Smelt

1. The Projects and the 2005 BiOp

Managed by the Bureau of Reclamation and the California Department of Water Resources, respectively, the Central Valley Project ("CVP") and the State Water Project ("SWP") are among the world's largest water diversion projects; both divert large volumes of water from the southern portions of the Delta, include major reservoirs North of the Delta, and transport water via natural watercourses and canal systems to areas South and West of the Delta. SER 112; *see also* SER 21, 25, 32 (mapping). The 1992 CVP Improvement Act prioritizes the CVP's uses: "first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and fish and wildlife mitigation,

protection and restoration purposes; and, third, for power and fish and wildlife enhancement." *See* Pub. L. No. 102-575, § 3406(a), 106 Stat. 4600, 4714 (1992) (amending Pub. L. No. 75-392, § 2, 50 Stat. 844, 850 (1937)).

The projects' operations are described in the periodically-revised Long-Term CVP Operations Criteria and Plan ("OCAP"). *Nat. Res. Def. Council, Inc. v. Kempthorne*, 506 F. Supp. 2d 322, 328 (E.D. Cal. 2007). The OCAP was last revised in 2004, and described 1992–2003 operations. The 2004 OCAP was used to help prepare the 2004 Biological Assessment for the Long-Term Operation of the CVP and SWP, in which the Bureau of Reclamation proposed to continue operations of the CVP and SWP, with several future changes. *See* SER 125–26. In 2005, FWS issued a BiOp that concluded that operations of the CVP and SWP as described in the 2004 Biological Assessment were not likely to cause jeopardy to the delta smelt. *Kempthorne*, 506 F. Supp. 2d at 328. But the United States District Court for the Eastern District of California set the 2005 BiOp's no-jeopardy conclusion aside in 2007, finding a number of inadequacies. *See id.* at 356–82.

2. The 2008 BiOp

In accordance with the district court's remand, FWS issued a new BiOp for continued long-term operations of the CVP and SWP in 2008, concluding that continued operation of the CVP and SWP as proposed by the Bureau of

Reclamation *is* likely to jeopardize the delta smelt's continued existence, and to adversely modify its critical habitat. *See* ER 368–71.[4/]

The 2008 BiOp noted that the delta smelt population had "trended precipitously downward since about 2000." SER 44; *cf.* 58 Fed. Reg. at 12,854 (stating, in 1993, that "[t]he delta smelt has declined nearly 90 percent over the last 20 years"). It said that water diversions, including for agriculture, had reduced habitat availability. *See* SER 42–43, 47, 56. These diversions had also resulted in substantial entrainment of fish, *see* SER 50–55, changes in relative salinity and freshwater flow, *see* SER 66, 85–87, 89, 90–91, and reductions in food availability, *see* SER 75. Summarizing, FWS stated that "[t]he CVP and SWP have played an important direct role in [the delta smelt's] decline, especially in terms of entrainment and habitat-related impacts that add increments of additional mortality to the stressed delta smelt population," and also an indirect one, "by creating an altered environment in the Delta that has fostered both the establishment of non-indigenous species and habitat conditions that exacerbate their adverse influence on delta smelt population dynamics." SER 79.

FWS found that the proposed CVP/SWP operations were likely to cause jeopardy to the delta smelt by: further reducing inflows to the Delta as upstream

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[4/] The 2008 BiOp is available at http://www.fws.gov/sacramento/es/delta_smelt.htm.

water demand increased; causing increased entrainment; and exacerbating other stressors. ER 368–70. Critical habitat was likely to be adversely modified, because the co-occurrence of primary constituent elements of such habitat (physical habitat, water, river flows, and salinity) would continue to be "very limited." ER 370. It included in the BiOp an RPA that would reduce entrainment, improve and restore habitat, and require monitoring and reporting. *See* ER 372–77. The BiOp included an ITS with terms and conditions, compliance with which would exempt the Bureau of Reclamation from ESA section 9 liability for takes. *See* ER 386–87; *see also* 16 U.S.C. § 1536(o)(2); *supra* at 9.

C. Proceedings Below

Various plaintiffs filed six lawsuits challenging the BiOp, five of which were consolidated in June 2009. *See* ER 398. The Stewart Appellants, members of water districts that use water from the CVP and SWP, filed a complaint, E.D. Cal. No. 09-892, whose sixth claim for relief alleged: "Because the delta smelt is a purely intrastate species, and because it has no commercial value, Sections 7(a)(2) and 9 of the ESA, 16 U.S.C. §§ 1536(a)(2), 1538, as applied to the [OCAP] for coordination of the [CVP] and the [SWP], are invalid exercises of constitutional authority." ER 352. As the district court noted, however, the Stewart Appellants' "motion for summary judgment focuse[d] exclusively on the theory that the application of Section 9's take prohibition to the smelt exceeds Congress'

authority under the Commerce Clause." ER 22–23; *see also* ER 29 ("Plaintiffs deliberately refuse to advance section 7 as a basis for their motion for summary judgment."); ER 71. The district court held that the Stewart Appellants had failed to establish Article III standing for an as-applied challenge to section 9, because they could not point to any imminent application of section 9. ER 27. For essentially the same reason, it also held that such a challenge would not be ripe. *See* ER 27–28. Notwithstanding that the Stewart Appellants had abandoned their as-applied challenge to section 7 on summary judgment, the district decided to rule on the merits of that issue. *See* ER 28–29. But it granted summary judgment for the Defendants-Appellees and the Intervenors-Defendants-Appellees, relying chiefly on *Gonzales v. Raich*, 545 U.S. 1 (2005), and its application in *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), to find that section 7 of the ESA as applied in the 2008 BiOp was a valid exercise of Congress' Commerce Clause power. *See* ER 43–58. This appeal followed.

SUMMARY OF ARGUMENT

The Stewart Appellants lack standing to bring an as-applied challenge to ESA section 9, because they have failed to point to any concrete and imminent imposition of section 9 liability resulting from operation of the CVP and SWP, as required to establish injury-in-fact for Article III purposes. For much the same reason, their as-applied challenge to section 9 is also unripe: they can point to no

imminent application of section 9 liability that would cause hardship to themselves, so as to justify pre-enforcement review. Furthermore, because the Stewart Appellants intentionally abandoned their as-applied challenge to section 7 on summary judgment, this Court should consider the claim waived.

In any event, both sections 7 and 9 of the ESA, as applied to the operations of the CVP and SWP, are valid exercises of the Commerce Clause power. The Supreme Court has held that Congress may regulate purely intrastate activity if it has a rational basis for believing that (1) the activity is part of a larger class of economic activity that has a substantial aggregate effect on interstate commerce; and (2) failure to regulate intrastate instances of that activity would undercut the overall regulatory scheme. It is irrelevant that a particular instance of regulated activity has only a *de minimis* effect on interstate commerce.

The four courts of appeal to consider the issue have upheld the ESA's application to intrastate species as a valid exercise of Commerce Clause power, holding that the ESA's comprehensive regulatory scheme has a substantial effect on interstate commerce, insofar as Congress had a rational basis for believing that protected species could be of significant scientific and commercial value to the United States, including through their unknown genetic properties and ecosystem roles. This Court, too, has upheld a wildlife protection statute's application to intrastate activities on comparable grounds.

Congress has not exceeded the bounds of its Commerce Clause power here. Sections 7 and 9 of the ESA, as applied to operation of the CVP and SWP, regulate "economic" activity under the Supreme Court's interpretation of that term. Congress had a rational basis for believing that the ESA's comprehensive regulatory scheme has a substantial aggregate effect on interstate commerce, and that sections 7 and 9 are essential components of that scheme, which would be undercut if intrastate species such as the delta smelt were excluded from its protections. The Supreme Court's invalidation of criminal statutes that infringed on state authority and had only a tenuous connection to interstate commerce in *Morrison* and *Lopez* does not compel a reversal here.

Finally, application of the ESA here was also authorized by the Necessary and Proper Clause.

STANDARD OF REVIEW

This Court "review[s] *de novo* pure questions of law decided on summary judgment." *Bjustrom v. Trust One Mortgage Corp.*, 322 F.3d 1201, 1205 (9th Cir. 2003). While *factual* evidence and inferences therefrom must be viewed in the light most favorable to the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), "the constitutionality of a federal statute is a question of law," *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007).

"Due respect for the decisions of a coordinate branch of Government

demands that [federal courts] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Statutes thus enjoy a "presumption of constitutionality," *id.*, and "[t]he task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow," *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981). To uphold a statute as within Congress' Commerce Clause authority, a court need not be convinced that the regulated activities, in the aggregate, actually have a substantial effect on interstate commerce, but instead need only find that Congress had a rational basis for so believing. *See United States v. Lopez*, 514 U.S. 549, 557 (1995); *United States v. Stewart*, 451 F.3d 1071, 1077 (9th Cir. 2006).

In reviewing whether a statute represents a valid exercise of the Commerce Clause power, a court may look to legislative history, but the absence of particularized findings on the connection to interstate commerce does not call Congress' authority to legislate into question. *Raich*, 545 U.S. at 21. Further, a court may not "'excise, as trivial, individual instances'" of the class of regulated activities in order to find a statute's application to the class unconstitutional. *Id.* at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

ARGUMENT

I. The Court Should Not Consider the Stewart Appellants' As-Applied Challenges to ESA Sections 7 and 9 to Be Properly Before It

A. The Stewart Appellants Lack Standing to Bring an As-Applied Challenge to Section 9

The plaintiff bears the burden of demonstrating Article III standing, *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009), and must show that it

> is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Id. at 1149. "'When the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily "substantially more difficult" to establish.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . ." *Lujan*, 504 U.S. at 561. But these are not "mere pleading requirements," *id.*, and the allegations must "rise to the level of a concrete, particularized, actual or imminent injury." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009). On summary judgment, however, the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts'" to establish standing. *Lujan*, 504 U.S. at 561.

Summers held that plaintiffs lacked standing to challenge regulations "in the

absence of a live dispute over a concrete application of those regulations." 129 S. Ct. at 1147; *see also id.* at 1150 ("Respondents have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members."). Similarly, the Stewart Appellants purport to bring an as-applied challenge to ESA section 9, but point to no imminent imposition of liability thereunder. Instead, their complaint alleges that they are customers of water districts that use water from the CVP and SWP, and that their water deliveries have been reduced "due to the Biological Opinion," not section 9. ER 337, 338; *see also* ER 275–92 (failing to refer to imminent imposition of section 9 liability in declarations filed with summary judgment motion refer to any imminent imposition of section 9 liability).

As the district court held, the Stewart Appellants have thus failed to establish two of the three elements required for standing by Article III. *See* ER 27. They have failed to point to any imminent application of section 9 that threatens them with concrete injury. *See Summers*, 129 S. Ct. at 1150. And they have failed to show that the harm they complain of—reduced water deliveries—is "fairly traceable" to section 9, *id.* at 1149. That they are attempting to challenge section 9's application to the governmental agencies and water districts rather than to themselves only heightens the inadequacy of their showings. *See Lujan*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or

inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.") (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). And a further hurdle comes from the fact that the Stewart Appellants are essentially attempting to rely on third parties for standing to allege a constitutional violation. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129–34 (2004) (noting general rule against third party standing in constitutional challenges, conceding that it may be appropriate where the parties are close and there is a hindrance to a plaintiff's ability to protect its own interests, but holding that lawyers lacked standing on behalf of indigent defendants).

The Stewart Appellants advance two arguments on why they have adequately established Article III standing for an as-applied challenge to ESA section 9, but neither satisfies *Summers*' essential requirement that they point to an imminent application of section 9.

First, they contend that invalidation of section 9 would preclude enforcement of the 2008 BiOp, insofar as it would arguably remove the legal impetus for complying with the ITS' terms and conditions. *See* Br. 14; *cf.* 16 U.S.C. § 1536(o)(2). In the first place, this argument ignores the independent obligation of federal agencies to avoid jeopardizing listed species. *See* 16 U.S.C. § 1536(a)(2). Moreover, as the district court correctly held, while this might have some bearing on the redressability prong of Article III standing, it fails to show

concrete and imminent injury in the form of section 9 liability, or that the harm asserted by the Stewart Appellants is fairly traceable to application of section 9. *See* ER 27. The Stewart Appellants' response that "the inquiry for purpose of standing is not whether there is a present *enforcement* action, but instead is whether the conduct complained of *causes* the injury in a fairly traceable manner," Br. 15 is fundamentally at odds with *Summers*: in order to have standing to bring an as-applied challenge *to* section 9 of the ESA, a plaintiff simply must show a "concrete application" *of* section 9 "that threatens imminent harm" to the plaintiff's interests, 129 S. Ct. at 1150.

Second, the Stewart Appellants misguidedly attempt to ground an as-applied challenge to section 9 in the Supreme Court's discussion of standing to allege a violation of section 7 in *Bennett*, 520 U.S. at 168. The plaintiffs in *Bennett* had alleged that a BiOp that evaluated an irrigation project's effects on endangered fish was invalid under section 7 of the ESA, as well as the Administrative Procedure Act ("APA"); ESA section 9 was not at issue. *See id.* at 160. Noting that a lesser showing is required to establish standing at the pleading stage, the Supreme Court held that the complaint had adequately alleged injury in fact from the BiOp in the form of reduced water deliveries. *Id.* at 167–68. The Court then rejected the government's argument that the plaintiffs had not adequately alleged causation and redressability because the BiOp would arguably not affect the

Bureau of Reclamation's ultimate water delivery decisions. *See id.* at 168–71. The Court quoted the government's own statement that the BiOp would have a "powerful coercive effect" on the agency, *id.* at 169, because adherence to the its terms and conditions would insulate the Bureau of Reclamation from liability for incidental takes, *id.* at 170 (citing 16 U.S.C. § 1536(o)(2)). Thus, the Court held that the plaintiffs had shouldered their "relatively modest" burden of making sufficient allegations at the pleading stage to challenge the BiOp's jeopardy conclusion. *Id.* at 171.

The Stewart Appellants contend that *Bennett*'s reasoning about causation and redressability with regard to section 7 at the pleading stage allows them to satisfy all three elements of standing to challenge section 9 at the summary judgment stage. *See* Br. 19. They are mistaken, because the *Bennett* plaintiffs's claims did not require them to point to any imminent application of section 9 in order to allege injury-in-fact, only to an application of section 7, which had already occurred. *See Bennett*, 520 U.S. at 167 (finding allegations that Bureau of Reclamation would "'abide by the restrictions *imposed by the Biological Opinion*,'" and thereby "adversely affect [petitioners] by substantially reducing the quantity of available irrigation water" sufficient) (emphasis added) (alteration in original). Again, the Stewart Appellants have in contrast failed to point to any concrete and imminent application of section 9, as *Summers* requires them to do.

Furthermore, the Stewart Appellants may not simply point to the relationship between sections 7 and 9 to establish standing, because "the application of one does not necessarily implicate the other," ER 25–26. The listing of a species imposes potential liability for any "take" of that species on any person subject to the jurisdiction of the United States. 16 U.S.C. § 1538(a)(1)(B). "Take" is both statutorily and regulatorily defined. *See id.* § 1532(19); 50 C.F.R. § 17.3 (2008). Section 7(a)(2), on the other hand, separately requires federal agencies to ensure that their actions not "jeopardize" listed species' continued existence. 16 U.S.C. § 1536(a)(2). Jeopardy has a wholly separate definition. *See* 50 C.F.R. § 402.02 (2008). A BiOp prepared to comply with section 7 may or may not include an ITS with terms and conditions that, if complied with, would insulate the action agency from some section 9 liability. *See* 16 U.S.C. § 1536(o)(2). But the mere existence of a BiOp is not a proxy for concrete and imminent imposition of section 9 liability, as the Stewart Appellants argue. If anything, the opposite is true, because compliance with an ITS' terms and conditions *immunizes* the action agency from section 9 liability. *See Bennett*, 520 U.S. at 170.

B. The Stewart Appellants' As-Applied Challenge to Section 9 Is Unripe

Relatedly, the district court was correct to conclude that the Stewart

Appellants' constitutional challenge to ESA section 9 as applied to the 2008 BiOp would not be ripe, *see* ER 27–28. Ripeness is drawn both from Article III limitations prudential reasons for refusing to exercise jurisdiction. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). In evaluating the prudential aspects of ripeness, the court's analysis "is guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (quoting *Abbott Labs.*, 387 U.S. at 149).

Thus, absent statutory authorization, a pre-enforcement challenge should only be considered ripe if "plaintiffs [face] the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993); *see, e.g.*, *id.* at 58 (holding that regulations governing INS's adjudicatory "legalization" process for illegal aliens were not ripe for review because they had yet to be applied to the plaintiffs in a "concrete action"); *cf. Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009) (finding *facial* pre-

enforcement challenge ripe). This Court requires a genuine threat of imminent prosecution, and considers "'whether the plaintiffs have articulated a "concrete plan" to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (quoting *Thomas*, 220 F.3d at 1139).

The district court here correctly found that the Stewart Appellants point to no concrete plan of *any* plaintiff[5] that is likely to incur liability under section 9, no threat of imminent enforcement action, nor any history of past prosecution. ER 15. The Stewart Appellants' as-applied challenge to section 9 of the ESA is therefore not ripe for much the same reason that they lack Article III standing.

C. This Court Should Decline to Entertain the Stewart Appellants' As-Applied Challenge to Section 7

Just as they did before the district court, the Stewart Appellants "deliberately refuse to advance section 7 as a basis" for their arguments, ER 29, instead insisting only that they have "standing to challenge the Biological Opinion

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[5] Contrary to the Stewart Appellants' brief, at 21, it is *their* as-applied challenge that must be ripe. Both this Supreme Court and this Court have considered whether the *plaintiff* will face hardship if judicial review is denied. *See, e.g.*, *Reno*, 509 U.S. at 57; *Stormans, Inc.*, 586 F.3d at 1122. And reliance on third parties to establish Article III jurisdiction over constitutional challenges is disfavored. *See supra* at 21.

under Section 9," Br. 19, and that "their challenge to the Biological Opinion . . . is based on section 9 of the ESA." Br. 20; *see also* ER 22–23 ("Plaintiffs' motion for summary judgment focuses exclusively on the theory that application of *Section 9*'s take prohibition to the smelt exceeds Congress' authority under the Commerce Clause."); ER 71. Having made a strategic decision, *see* ER 23, to abandon their as-applied challenge to section 7 on summary judgment, the Stewart Appellants have waived the claim. This Court should decline to entertain it.

The claim is waived for two reasons: the Stewart Appellants' abandonment of it before the district court, *see* ER 22–23, 29; *see, e.g.*, *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998); and their failure to raise it squarely in their opening brief on appeal, *see* Br. 20 (stating that "their challenge to the Biological Opinion . . . is based on section 9 of the ESA"); *see, e.g.*, *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003); *see also USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994) ("[T]here is no reason not to hold [plaintiff] to the contentions that it *did* make. It is a general rule that a party cannot revisit theories that it raises but abandons at summary judgment."). The Stewart Appellants' statement in a footnote that "[t]here was no dispute at the district court that [they] have standing to bring a

Section 7 claim," Br. 14 n.2, is insufficient to preserve such a claim on appeal.[6]

II. Application of the ESA to the Operations of the CVP and SWP, Through the 2008 BiOp Evaluating Their Effects on the Delta Smelt, Is a Valid Exercise of the Commerce Clause Power

A. The Commerce Clause Empowers Congress to Regulate Purely Intrastate Activity Provided It Has a Rational Basis for Believing that All Instances of the Regulated Activity Have a Substantial Aggregate Effect on Interstate Commerce, and that Exclusion of Intrastate Activity Would Undercut the Regulatory Scheme

1. The Supreme Court's Articulation of the Permissible Scope of the Commerce Clause Power

The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Congress is authorized "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its Commerce Clause power. *Id.* art. I, § 8, cl. 18. The Supreme Court's has construed this power expansively, *Morrison*, 529 U.S. at 608, but it does have "judicially enforceable outer limits," *Lopez*, 514 U.S. at 566; *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) ("[T]he scope of this power must be considered in the light of our dual system of government and may

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[6] The district court chose to consider whether section 7 as applied in the 2008 BiOp was a valid exercise of the Commerce Clause power, induced by the arguments of *amici* and by the government's summary judgment motion. *See* ER 23, 29. But Article III jurisdiction cannot be created merely by agreement of the parties. *Guzman-Andrade v. Gonzales*, 407 F.3d 1073, 1077 (9th Cir. 2005). This Court has "an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers*, 129 S. Ct. at 1152.

not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local . . . .”). Specifically, Congress is empowered to adopt legislation that: (1) regulates the channels of interstate commerce; (2) regulates and protects the instrumentalities of interstate commerce, and persons or things in interstate commerce; or (3) regulates activities that substantially affect interstate commerce. *Raich*, 545 U.S. at 17 (citing *Perez*, 402 U.S. at 146).

The third category is at issue here, and extends to regulation of “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Id.* (citing *Perez*, 402 U.S. at 151; *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942)). Congress may regulate purely intrastate activity on the basis of the substantial *aggregate* effect that all instances of that class of activity have on interstate commerce, even if the particular instance lacks such an effect. *See id.* at 17 (“When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”); *id.* at 22 (“[C]omprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce”); *Lopez*, 514 U.S. at 558 (“‘[W]here *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of

individual instances arising under that statute is of no consequence.'" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968))).

Before considering the aggregate effect of a class of activity, courts often address whether the particular instance of the activity before the court is "economic" in nature; but the Supreme Court has not required such an inquiry. *See Morrison*, 529 U.S. at 613 (noting that, although the Court had never "adopt[ed] a categorical rule against aggregating the effects of any noneconomic activity in order to decide" a Commerce Clause challenge, up until then "[the Court's] cases ha[d] upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"). *But see Wickard*, 317 U.S. at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."). The Court has also acknowledged that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." *Lopez*, 514 U.S. at 566. In any event, its cases show that the concept of "economic activity must be understood in broad terms." *Gibbs*, 214 F.3d at 491; *see infra* at 31–33 (discussing *Raich* and *Wickard*). And, ultimately, uncertainty about the economic *vel non* nature of a particular instance of regulated activity does not lead to a constitutional violation, as long as regulation of the class is "an essential part of a

larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561.

Thus, Congress has the power to regulate a purely intrastate activity if it has a rational basis for believing that: (1) the regulated intrastate activity is part of a larger class of economic activity that has a substantial aggregate effect on interstate commerce; and (2) failure to regulate intrastate instances of that activity would undercut the overall regulatory scheme. *See, e.g.*, *Stewart*, 451 F.3d at 1076–77 (upholding statutory ban on possession of machine guns applied to intrastate possession, because Congress had a rational basis for believing that possession could affect interstate supply and demand in the aggregate, and that intrastate ban would fill a gap in a comprehensive regulatory scheme); *see also Tombigbee*, 477 F.3d at 1272–74 (upholding application of ESA section 4 to intrastate species because the ESA's comprehensive scheme of species protection has a substantial effect on interstate commerce, and because Congress had a rational basis for concluding that regulation of intrastate species was essential part of that regulatory scheme).

Applying these principles in *Wickard*, the Supreme Court held that Congress had a rational basis for applying a federal statute to a farmer's production of wheat intended solely for personal consumption. First, it found a substantial aggregate effect on interstate commerce notwithstanding the non-

commercial nature of a single farm's subsistence crop. *See* 317 U.S. at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."); *id.* at 127–28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."). Second, the Court noted the importance of regulating intrastate consumption of home-grown wheat to the larger statutory scheme. *See id.* at 128–29 ("Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade . . . ."). *Wickard* thus "established that Congress can regulate purely intrastate activity that is not itself 'commercial,' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18.

Most recently, *Raich* itself upheld application of the Controlled Substances Act to intrastate possession of home-grown medical marijuana. *Id.* at 33. Applying *Wickard*'s analysis, it found that "Congress had a rational basis for concluding" that possession of medical marijuana for home use, in the aggregate,

would have a substantial effect on the illegal interstate marijuana market. *Id.* at 19. It found the *de minimis* nature of the plaintiff's regulated conduct irrelevant. *See id.* at 19; *see also Stewart*, 451 F.3d at 1075 ("[T]he fact that Raich did not herself affect interstate commerce was of no moment."). And the Court further found a rational basis for believing that regulation of medical marijuana was "one of many 'essential part[s]'" of the Controlled Substances Act's "comprehensive framework," which would be undercut if intrastate possession were excluded. *Raich*, 545 U.S. at 24; *see also id.* at 22 ("[F]ailure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole . . . .").

The Supreme Court has thus consistently held that Congress may regulate intrastate activity of a class that has a substantial aggregate effect on interstate commerce, where failure to regulate intrastate activity of that class would undercut the overall legislative scheme.[7]

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[7] *Wickard* and *Raich* are not the only Supreme Court cases to uphold regulation of intrastate activity under the Commerce Clause where it was an important part of a larger regulatory scheme having a substantial effect on interstate commerce. *See, e.g.*, *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) (finding it "enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole" is "related to the congressional goal of preventing adverse effects on interstate commerce"); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (stating Commerce Clause power to "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."); *see also Perez*, 402 U.S. at 151–55 (discussing ten cases).

2. *Lopez* and *Morrison*'s Inapplicable Limitations on the Exercise of Commerce Clause Power

The Supreme Court has struck down two federal statutes for exceeding the scope of congressional power under the Commerce Clause's "substantial effect" prong, because they attempted to regulate areas of traditional state authority with a tenuous connection to interstate commerce. They do not compel a reversal of the district court here. *See infra* at 54–57.

At issue in *Lopez*, 514 U.S. at 549, was the Gun-Free School Zones Act of 1990, a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Court rejected the government's proffered arguments that the statute substantially affected interstate commerce insofar as the costs of violent crime are substantial, people do not travel to unsafe areas, and violent crime affects education adversely; under this reasoning, "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564; *see also id.* ("[I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); *id.* at 567 ("[W]e would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

Similarly, *Morrison*, 529 U.S. at 598, struck down the Violence Against Women Act, which simply created a civil remedy for the victims of gender-motivated violent crimes. The Court found that such crimes "are not, in any sense of the phrase, economic activity." *Id.* at 613. It followed *Lopez* in finding any connection between gender-motivated violent crime and interstate commerce far too attenuated:

> The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime so long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. . . .

Id. at 615.

Ultimately, "*Lopez* and *Morrison* rest on the principle that where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power." *Gibbs*, 214 F.3d at 491.

Lopez and *Morrison* considered four factors in analyzing whether the statutes at issue had a substantial effect on interstate commerce: (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether

Congress made express findings about the effects of the proscribed activity on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated. *Stewart*, 451 F.3d at 1074. While not purporting to overrule *Lopez* or *Morrison*, *Raich* neither applied nor mentioned this four-factor analysis. That alone refutes the Stewart Appellants' argument that a Commerce Clause challenge "must be analyzed under factors set forth in *Lopez* and *Morrison*," Br. 11. Nor has this Court necessarily considered these four factors, either before or after *Raich*. *See, e.g.*, *United States v. McCalla*, 545 F.3d 750, 753–56 (9th Cir. 2008) (relying on *Raich* to uphold statute, and rejecting defendant's argument that factor analysis compelled invalidation); *Stewart*, 451 F.3d at 1073–74 (revisiting analysis of prior panel decision, which had considered factors); *Bramble*, 103 F.3d at 1480–82 (9th Cir. 1997) (upholding Eagle Protection Act).

B. Four Other Courts of Appeals Have Followed the Supreme Court's Analytical Framework and Held that Application of the ESA to a Purely Intrastate Species Is a Valid Exercise of the Commerce Clause Power

The ESA has been repeatedly addressed by the Supreme Court, with no hint in any of the decisions that the statute is unconstitutional. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651–52 (2007) ("*NAHB v. Defenders*"); *Bennett*, 520 U.S. at 154; *Babbitt v. Sweet Home Chapter of Cmties.*

for a Great Or., 515 U.S. at 687; *Hill*, 437 U.S. at 153. Indeed, *Raich* referred to the prohibition in the Bald Eagle Protection Act—which is similar to ESA section 9—as a valid exercise of the Commerce Clause power when applied intrastate. *See* 545 U.S. at 26 & n.36 (citing 16 U.S.C. § 668(a)); *see also infra* at 40–41 (discussing this Court's identical holding).

Moreover, all four courts of appeals to have considered the issue have held that application of the ESA to a species found solely within one state is a valid exercise of Commerce Clause power. Although the specific rationales of their decisions varied somewhat, all four Circuits specifically held that the ESA's comprehensive regulatory scheme has a substantial effect on interstate commerce, and three of the four specifically held that exclusion of intrastate species would undercut that scheme. The Stewart Appellants' assertion that all four got it wrong for different reasons, *see, e.g.*, Br. 40, 60, overlooks what the decisions have in common.

In *Tombigbee*, the Eleventh Circuit upheld the listing of the Alabama sturgeon, a fish of no current commercial value thought to occupy a single river in Alabama, as endangered. 477 F.3d at 1253. The court first "agree[d] with the three circuits that have concluded the [ESA] is a general regulatory statute bearing a substantial relation to commerce," *id.* at 1273, pointing *inter alia* to the illegal commercial market in endangered species; the value of genetic biodiversity to

medicine, agriculture, and aquaculture; and to the encouragement of fishing, hunting, and tourism. *Id.* at 1273–74. It then held that listing species as threatened or endangered is an essential part of that larger regulation of economic activity, *id.* at 1274, and that Congress had a rational basis for including purely intrastate species within the larger regulatory scheme, because of: the unknown future uses that listed species might have; the unknown food web roles of particular species; and the possibility that listed species might recover to the point of being available for controlled exploitation in the future, *id.* at 1274–75.

GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003), upheld the application of ESA section 9's take prohibition to six endangered species of subterranean invertebrates (for which there was no commercial market) found only within caves in two Texas counties. Following *Lopez* and *Morrison*, the Fifth Circuit found it appropriate to consider the aggregate effects of listing endangered species—and not the listings of these six species in isolation—to determine whether there is a substantial effect on interstate commerce, because the ESA's overall regulatory scheme is economic in nature. *See id.* at 639 (finding that "ESA's protection of endangered species is economic in nature" because of the potential value of genetic biodiversity that might be lost absent regulation). And it found a rational basis for considering a prohibition on takes of intrastate species to be an integral part of the ESA's regulatory scheme, considering the

unforeseeable future uses of intrastate species and Congress' awareness of the importance of maintaining the "interdependent web" of species. *Id.* at 640.

Gibbs, 214 F.3d at 488 (4th Cir. 2000), upheld an FWS regulation that governed experimental populations of red wolves reintroduced into North Carolina and Tennessee pursuant to section 10(j) of the ESA, including modified prohibitions on takes occurring on private land. The court first concluded that limiting red wolf takes is economic in nature. *Id.* at 492. It then found a substantial aggregate effect on interstate commerce, *id.* at 493, through effects on tourism, scientific research, possible future trade, livestock, and the unforeseeable future uses to which the species might be put, *id.* at 492–97. As an apparent alternative ground, the court held that the regulation was "also sustainable 'as an essential part of a larger regulatory regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 497 (quoting *Lopez*, 514 U.S. at 561).

Finally, in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB v. Babbitt*"), the D.C. Circuit upheld the application of ESA section 9's take prohibition to an endangered fly found only in two California counties. A majority of the court held that application of section 9 to a purely intrastate species of no immediate commercial value was nevertheless a class of activity that had a substantial effect on interstate commerce. *See id.* at 1049–57

(opinion of Wald, J.); *id.* at 1057–60 (Henderson, J., concurring). The court pointed to the actual and potential value of biodiversity, *see id.* at 1053–54 (opinion of Wald, J.) ("In the aggregate . . . we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce."); *id.* at 1058 (Henderson, J., concurring) ("I believe that the loss of biodiversity itself has a substantial effect . . . on interstate commerce."). As an alternate ground, the majority held that "the Department's protection of the flies regulates and substantially affects commercial development activity which is plainly interstate." *Id.* at 1058 (Henderson, J., concurring); *see also id.* at 1046 n.3 (opinion of Wald, J.) (agreeing).

This Court, too, applied a two-step analysis in holding that the Bald Eagle Protection Act's prohibition on intrastate possession of protected wildlife is a valid exercise of the Commerce Clause power. *Bramble* first used aggregation of the effects of possession of eagle parts to find a substantial effect on interstate commerce. *See* 103 F.3d at 1481 ("Both commerce in and possession of eagle parts, each taken as a class, have substantial effects on interstate commerce, because both activities, even when conducted purely intrastate, threaten the eagle with extinction."); *id.* (finding that extinction would "substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in beneficial products derived . . . from analysis of . . .

genetic material"). Having found a substantial effect on interstate commerce, the court also held that Congress had a rational basis for considering a ban on intrastate possession to be an integral part of the regulatory scheme. *See id.* at 1482 ("Congress' belief that the means it chose were necessary to preserve the eagles from extinction was also rational."). *Bramble* analogized the Bald Eagle Protection Act to the ESA, and quoted "with approval," *id.* at 1481, a district court decision that had upheld the ESA against a Commerce Clause challenge. *See id.* ("'[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species . . . .'" (quoting *Palila v. Haw. Dep't of Land & Nat. Res.*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981)) (alteration in original).

C. Sections 7 and 9 of the ESA, as Applied to the CVP and SWP Operations, Are a Valid Exercise of the Commerce Clause Power

As the district court correctly held, the ESA, as applied to the continued operations of the CVP and SWP through the 2008 BiOp, is constitutionally valid, because Congress had a rational basis for determining that (1) the ESA's comprehensive legislative scheme regulates a class of activity that has a substantial aggregate effect on interstate commerce and (2) sections 7 and 9 of the statute are essential parts of the ESA's legislative scheme, which would be undercut if they were not applied to intrastate species such as the delta smelt. *See*

ER 51–52, 54. This reasoning is consistent with Supreme Court precedent; *Lopez* and *Morrison* do not compel a contrary result.

1. ESA Protections for the Delta Smelt Are Economic in Nature

As an initial matter, even if this Court were to assume that aggregation of the effects of an entire class of regulated activity is only permissible if a particular instance thereof qualifies as "economic activity," *see Morrison*, 529 U.S. at 613; *supra* at 30, it should find aggregation appropriate here. The Supreme Court's case law shows that "economic activity" is broadly defined, and that legal uncertainty about the economic nature *vel non* of a particular instance of regulated conduct is insufficient to find a constitutional violation. *See supra* at 30–31.

Like many species, *see* 16 U.S.C. § 1531(a), the delta smelt requires the ESA's protections because of the impacts of economic activity: it "is primarily threatened by large freshwater exports from the Sacramento River and San Joaquin River diversions for agriculture and urban use." 58 Fed. Reg. at 12,854. As the district court recognized, the particular activity here "is the operation of the CVP and SWP," ER 54, which is regulated in two pertinent ways: (1) by the 2008 BiOp, which effectuates section 7's prohibition on jeopardy through identification of an RPA to reduce the effects of the take below the jeopardy threshold and imposition

of terms and conditions; and (2) by section 9's prohibition on delta smelt takes.[8] Operation of the CVP and SWP is clearly an economic activity. *See supra* at 11, 13 (discussing purposes).

The Stewart Appellants' argument that the relevant regulated activity is delta smelt takes in the abstract, divorced from operation of the CVP and SWP, *see* Br. 61–64, is self-contradictory. Their complaint alleged that sections 7 and 9 "as applied to the [OCAP] for coordination of the [CVP] and the [SWP], are invalid exercises of constitutional authority." ER 352.[9] They claim standing to bring an as-applied challenge to section 9 because liability thereunder "is a major component of the delta smelt biological opinion," Br. 19, and because "the purported authority to regulate delta smelt takes by means of section 9 causes reduced water deliveries to the Stewart Appellants in a fairly traceable manner," Br. 15. In contrast, however, they now argue that a court must divorce the challenged regulated activity from its effects when considering whether it is economic in nature. *See* Br. 62–63. They cannot have it both ways. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1077 (D.C. Cir. 2003) (characterizing

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[8] To reiterate, the Court should consider neither section 7 nor section 9 to be properly before it. *See supra* at 19–28.

[9] In arguing that looking to the CVP and SWP would be contrary to *Lopez* and *Morrison*, the Stewart Appellants overlook the fact that those cases were facial challenges, *Raich*, 545 U.S. at 72 (Thomas, J., dissenting), whereas theirs are as-applied.

plaintiff developer's attempt to limit court's inquiry to a single listed species allegedly lacking in commercial value, without reference to commercial nature of developer's own activities, as "simply the plaintiff's attempt to have its cake and eat it too").[10/]

Furthermore, as discussed *supra*, at 34–35, and *infra*, at 56–57, *Lopez* and *Morrison* are inapplicable because they regulated criminal activity—a traditional State concern—that could not be considered "economic activity" in any sense of the word, and had a connection to interstate commerce far more tenuous than does the ESA's regulatory scheme. Finally, divorcing the Stewart Appellants' claims from the 2008 BiOp that regulates operation of the CVP and SWP would be inappropriate because five of the six claims in their complaint are brought under the APA, *see* ER 348–51, which they also alleged as a basis for the district court's jurisdiction, *supra* at 1. The APA requires a "final agency action," 5 U.S.C. § 704, and the Stewart Appellants acknowledge that the final agency action challenged here is the 2008 BiOp, *see* Br. 12 n.3; *see also Bennett*, 520 U.S. at 178 (holding that BiOp with ITS qualifies as final agency action).

There can be no question that the 2008 BiOp, which imposes terms and

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[10/] Contrary to the Stewart Appellant's representations, *see* Br. 63, *GDF*'s statement that the district court there "erred in looking primarily to plaintiffs' commercial motivations," 326 F.3d at 636, does not support their argument: *GDF* did not involve a BiOp that regulates activity that is clearly economic—here, diversions of water for agricultural and urban use.

conditions upon the operation of enormous projects that divert water for agriculture and urban uses, *see supra* at 11, 13, is economic in nature, or that those projects themselves are economic in nature. *See Rancho Viejo*, 323 F.3d at 1069 (relying in part on economic nature of activity from which FWS found jeopardy—development—to conclude that ESA section 7 has a substantial effect on interstate commerce). And even section 9's prohibition on individual takes resulting from operation of the CVP and SWP may fairly be characterized as economic.[11/] *Gibbs*, for instance, held that a limitation on takes of red wolves was economic in nature in part because "[t]he protection of commercial and economic assets is a primary reason for taking the wolves." 214 F.3d at 492. *GDF* held that prohibiting takes of cave-dwelling invertebrates was economic in nature because of species' unforeseeable uses and ecosystem roles, so that takes of those invertebrates could be aggregated with all other ESA takes. *See* 326 F.3d at 640. This Court similarly held in *Bramble* that intrastate possession of eagle parts was a regulated activity whose effects could permissibly be aggregated in the Court's Commerce Clause analysis, because such possession "threaten[s] the eagle with extinction," which would foreclose the possibility of "future commerce in beneficial products derived either from eagles or from analysis of their genetic

[11/] Furthermore, section 9 also explicitly prohibits "interstate . . . commerce" in listed species. 16 U.S.C. § 1538(a)(1)(E) & (F).

material." 103 F.3d at 1481. Takes resulting from operation of the CVP and SWP represent an even starker existential threat to the delta smelt, which may possess past and hitherto-unknown economic value of its own, *see infra* at 47–50.

2. Congress Had a Rational Basis for Determining that the ESA's Comprehensive Regulatory Scheme Has a Substantial Effect on Interstate Commerce

The district court had little difficulty in following the four other Circuits' analysis and holding that the ESA's comprehensive regulatory scheme has a substantial aggregate effect on interstate commerce. *See* ER 43–53. The legislative history of the ESA and its predecessor show that Congress had a rational basis for believing that protection of imperiled species would be commercially and economically beneficial to the Nation and its people for at least three reasons.

First and most obviously, the statute's protections could "permit the regeneration of that species to a level where controlled exploitation can be resumed," leading to "profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels." S. Rep. No. 91-526, at 3, *reprinted in* 1969 U.S.C.C.A.N. at 1415; *see also* H.R. Rep. No. 93-412, at 6 (noting that species' value "should encourage [countries] to maintain healthy and viable stocks of these animals as a resource"); *see, e.g.*, *Gibbs*, 214 F.3d at 495 (discussing

recovery of American alligator as example).

The Stewart Appellants and *amici* are wrong to argue that the Commerce Clause requires an existing market for delta smelt. *See Wirtz*, 392 U.S. at 196 n.27 ("[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."). Nevertheless, the administrative record does contain evidence that the fish was previously treated as a commodity. *See* SER 128 ("[D]elta smelt were harvested commercially with other smelt . . . and silverslide . . . species during the 19th and early 20th centuries in a prosperous 'smelt' fishery."); *see also* 58 Fed. Reg. at 12,860 ("[I]t may be harvested as a non-target by-catch in commercial bait fisheries for other baitfish species."); SER 144–45, 142 (stating Delta smelt were previously thought to be genetically identical to an introduced fish, and valuable as a "forage fish" for salmon). Furthermore, the United Nations has estimated the value of illegal trade (prohibited by ESA section 9) in protected species to generate between $5 billion and $8 billion annually worldwide, with Americans spending an estimated $200 million annually on illegally-caught animals. *Tombigbee*, 477 F.3d at 1273; *cf. Raich*, 545 U.S. at 3 (relying on "established, and lucrative, [illegal] interstate market" in marijuana).

Second and "[p]otentially more important[ly]," S. Rep. No. 91-526, at 3, *reprinted in* 1969 U.S.C.C.A.N. at 1415, the "genetic variations" of protected

species "are potential resources" with a value that is "quite literally, incalculable," H.R. Rep. No. 93-412, at 5, 4. In 1972, Congress pointed out that "one of the critical chemicals in the regulation of ovulation in humans was found in a common plant," and hypothesized that as-yet-unknown genetic structures of other species could provide "potential cures for cancer or other scourges." H.R. Rep. No. 93-412, at 5; *see, e.g.*, *Tombigbee*, 477 F.3d at 1274 (citing example of rosy periwinkle, which was driven nearly to extinction before scientists discovered that it contained substances now used to treat cancer). Indeed, the majority of the most commonly-prescribed medicines "are derived from plant and animal species." *Id.* at 1273. Preservation of genetic biodiversity is also of immeasurable value to agriculture and aquaculture: introduction of genetic material from wild species can enhance the productivity and commercial value of cultivate species, as well as protect them against disease and pests. *NAHB v. Babbitt*, 130 F.3d at 1052–53 (opinion of Wald, J.); *see, e.g.*, Sarah Mollett, Comment: *The Chesapeake Bay's Oysters: Current Status and Strategies for Improvement*, 18 Penn St. Envtl. L. Rev. 257 (2010) (arguing that introduction of wild oysters from other areas in addition to those derived from aquaculture stock would reduce the likelihood of a "genetic bottleneck's" hindering rebuilding of the Chesapeake Bay oyster population). The delta smelt is the subject of continuing scientific research. *See, e.g.*, SER 2–5; 75 Fed. Reg. at 17,669; *see also* SER 133–39 (evaluating delta

smelt within context of larger pelagic organism decline in Delta). Ultimately, "[e]ach time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes." *NAHB v. Babbitt*, 130 F.3d at 1053 (opinion of Wald, J.).

Third and finally, Congress was aware "that many of these animals perform vital biological services to maintain a 'balance of nature' within their environments." S. Rep. No, 93-307, at 1, *reprinted in* 1973 U.S.C.C.A.N. at 2990; *see also Hill*, 437 U.S. at 178–79 ("Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet."); H.R. Rep. No. 93-412, at 6 (discussing recent awareness of "the critical nature of the interrelationships of plants and animals between themselves and with their environment").

> "Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage."

NAHB v. Babbitt, 130 F.3d at 1053 n.11 (opinion of Wald, J.) (quoting Edward O. Wilson, *The Diversity of Life* 308 (1992)). The delta smelt, for example, feeds upon zooplankton and a variety of other species, and is in turn potential prey for the introduced striped bass. 58 Fed. Reg. at 12,854, 12,860; *see also* SER 132.

FWS expected designation of delta smelt critical habitat "to positively affect all components of the food web," including commercial and recreational salmon fisheries, which would also benefit economically. 59 Fed. Reg. at 65,263; *cf. Tombigbee*, 477 F.3d at 1274 ("A species' simple presence in its natural habitat may stimulate commerce by encouraging fishing, hunting, and tourism.").

In addition, the commercial nature of the operation of the CVP and SWP, as well as of the activities that the Stewart Appellants contend will be affected by the 2008 BiOp, reinforces the economic nature of the ESA's regulatory scheme. *See supra* at 11, 13; ER 337, 338 (alleging the Stewart Appellants are agricultural customers of water districts that use water from the CVP and SWP, and that they produce crops that are sold "to customers throughout California and the world"); *see also* ER 279, 288, 291 (declaring substantially the same). The D.C. Circuit and the Fourth Circuit have both relied partly on the commercial or economic character of the activities that posed a risk to an intrastate species in support of their holdings that the ESA has a substantial effect on interstate commerce. *See Rancho Viejo*, 323 F.3d at 1069; *Gibbs*, 214 F.3d at 492.

3. Sections 7 and 9 of the ESA Are Essential Parts of the Larger Statutory Scheme, Which Could Be Undercut if They Were Not Applied to Intrastate Species

Nor can there be any doubt that sections 7 and 9 are both "'essential part[s]" of the ESA's "larger regulation of economic activity, in which the regulatory

scheme could be undercut unless the intrastate activity were regulated," *Lopez*, 514 U.S. at 561.

This Court has characterized section 7 as "integral" to the ESA's regulatory scheme. *Ariz. Cattle Growers Ass'n v. FWS*, 273 F.3d 1229, 1251 (9th Cir. 2001). Section 7 requires every federal agency to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

The substantive prohibition on jeopardy, which bars any act that "would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species," 50 C.F.R. § 402.02 (2008), is absolute: "[t]he pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Hill*, 437 U.S. at 185. In the legislative history of section 7, the Court further found "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *Id.* More recently, the Court has reiterated that the prohibition applies "regardless of the expense or burden its application might impose." *NAHB v. Defenders*, 551 U.S. at 671.

The prohibition on jeopardy also has a broad sweep, applying to all

affirmative, discretionary agency actions. *See id.*; *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006). "Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . . ." 50 C.F.R. § 402.02 (2008). Thus, absent section 7, a litany of activities that in some way involve federal agencies might jeopardize the continued existence of listed species—indeed, no expert agency would even be required to investigate whether that was a possibility.

"The essential nature of section 9 . . . is even more obvious," ER 54, in that it directly prohibits harm—broadly defined—to listed species, thereby affecting "a vast range of economic and social enterprises and endeavors," *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. at 700, 707; *see supra* at 7; *see also Gibbs*, 214 F.3d at 492 (characterizing prohibition on takes as "an integral part of the overall federal scheme"). Absent section 9's prohibition on takes—and the civil and criminal liability attendant to it—a crucial mechanism for protecting listed species from the threat of extinction at the hands of private actors would be lacking, which "would leave a gaping hole" in the ESA, *Raich*, 545 U.S. at 22.

Finally, Congress had a rational basis for including regulation of purely intrastate species in the ESA, whose comprehensive scheme would be undercut if such species were excluded. Congress was concerned about "the unknown uses that endangered species might have." *Hill*, 437 U.S. at 178–79. "Because a

species' scientific or other commercial value is not dependent on whether its habitat straddles a state line, Congress had good reason to include all species within the protection of the [ESA]." *Tombigbee*, 477 F.3d at 1275. Furthermore, the Supreme Court has held that Congress may regulate intrastate activity in order to arrest a potential regulatory "race to the bottom" among States, i.e., to prevent interstate competition whose overall effect would damage the quality of the environment. *NAHB v. Babbitt*, 130 F.3d at 1049, 1054–55 (opinion of Wald, J.) (citing *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. at 282). And, as the Fourth Circuit has observed, "[i]t would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." *Gibbs*, 214 F.3d at 498. It would be equally perverse to find a species so in need of protection as to be found only within one state beyond Congress' power, while species sufficiently abundant to span multiple states were subject to full federal regulatory power.

Congress clearly had a rational basis for believing that exclusion of intrastate species from the protections of sections 7 and 9 of the statute would leave a gap in the overall regulatory scheme. And whether the delta smelt itself indeed turns out to have future commercial value thanks to the ESA's protections is irrelevant to the Commerce Clause inquiry. *See Perez*, 402 U.S. at 154 ("Where

the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." (quoting *Wirtz*, 392 U.S. at 193)); *Stewart*, 451 F.3d at 1075 ("[T]he fact that Raich did not herself affect interstate commerce was of no moment."); *Gibbs*, 214 F.3d at 498 ("The judiciary lacks the delegated powers of the FWS . . . . The specific needs of individual species . . . present a classic case for legislative balancing.").

4. *Lopez* and *Morrison* Do Not Counsel a Contrary Result

Lopez and *Morrison* both struck down federal statutes that bore only a tenuous connection to commerce and infringed on areas of traditional state concern. *See supra* at 34–35. They do not compel a conclusion that application of the ESA to the 2008 BiOp is beyond the Commerce Clause power.

a. Consideration of the Four *Lopez*/*Morrison* Factors Is Optional, and Would Not Require Invalidation, Regardless

This Court need not consider the four factors discussed in *Lopez* and *Morrison*. *See supra* at 35–36. But they would not militate against the district court's holding, anyway.

First, as extensively discussed, Congress had a rational basis for believing sections 7 and 9 of the ESA to have a fundamentally economic or commercial nature even when applied to intrastate species, and to have a substantial aggregate

effect on interstate commerce. *See supra* at 3–5, 46–50; *cf. Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

Second, "all of the circuits that have addressed the question since *Lopez* [and] *Morrison* . . . have concluded that the absence of an express jurisdictional element is not fatal to [the ESA's] constitutionality under the Commerce Clause." *Rancho Viejo*, 323 F.3d at 1068. "The absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates 'activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[ ] interstate commerce." *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999) (internal quotation marks and citations omitted) (alteration in original). Again, that independent analysis calls for upholding the ESA here. *See GDF*, 326 F.3d at 640 ("Although . . . there is no express jurisdictional element in ESA, our analysis of the interdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce.").

Third, although Congress did not make formal findings about the effects of ESA sections 7 and 9 on interstate commerce, *Raich* clarified that the "the absence of particularized findings does not call into question Congress' authority to

legislate." 545 U.S. at 21. Furthermore, Congress did formally find that many species had become extinct "as a consequence of economic growth and development." 16 U.S.C. § 1531(a)(1). And the statute's legislative history refers to the commercial and economic importance of protecting listed species. *See supra* at 3–5.

Fourth, while the link between the prohibited activity and the effect on interstate commerce was highly attenuated in *Lopez* and *Morrison*, *see supra* at 34–35, that is not the case here: the Stewart Appellants' proffered standing to challenge the ESA is based on its adverse effects on their commercial activities, *see supra* at 20, 43, 50.

b. The ESA Does Not Infringe on an Area of Traditional State Sovereignty

Both *Lopez* and *Morrison* turned largely on the fact that—by regulating criminal activity under the auspices of the Commerce Clause—Congress was infringing on areas "where States historically have been sovereign." *Lopez*, 514 U.S. at 564. But "States have not traditionally regulated or protected most threatened or endangered species." Bradford C. Mank, *After* Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. Colo. L. Rev. 375, 432 (2007); *see also Rancho Viejo*, 323 F.3d at 1079 ("[R]egulation of the taking of endangered species 'does not involve an "area of

traditional state concern," one to which "States lay claim by right of history and expertise."'" (quoting *Gibbs*, 214 F.3d at 499)). In *Hughes v. Oklahoma*, 441 U.S. 322, 335–36 (1979), the Supreme Court held that states do not own the wildlife within their borders, and that state laws regulating wildlife are circumscribed by the Commerce Clause power. *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government . . . ."); *Gibbs*, 214 F.3d at 499 (relying on *Hughes* and *Minnesota* to hold that prohibition on taking purely intrastate species "is not an area in which the states may assert an exclusive and traditional prerogative in derogation of an enumerated federal power"). What is more, this particular federal authority is limited to species that are threatened or endangered, and does not circumscribe other state authority. *See id.* at 504 (stating that ESA "is restricted to the special relationship between endangered species and interstate commerce"). In sum, it cannot be said that the ESA as applied here blurs the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S., at 617–618.

III. Alternatively, Application of ESA Sections 7 and 9 of Was Necessary and Proper to Effectuate Congress' Commerce Clause Power

The Stewart Appellants essentially concede that the Commerce Clause

empowers Congress to regulate protected species for which there is a commercial market. *See* Br. 3, 67, 70. In turn, "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation" to effectuate its enumerated powers. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010). The standard for constitutional validity is "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power," *id.*, and the Court has applied it permissively: "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Id.* (citing *McCulloch v. Maryland*, 4 Wheat. 316, 413, 418 (1819)).

Because Congress may regulate protected species for which there is a commercial market, the Necessary and Proper Clause allows Congress also to regulate species with *potential* commercial value, a rationally related means of execution of the Commerce Clause power in light of the vast potential commercial value of protected species, *see supra* at 3–5, 46–50; *see also Comstock*, 130 S. Ct. at 1957 ("[T]he relevant inquiry is simply 'whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power' or under other [enumerated] powers . . . ."); *Raich*, 545 U.S. at 34 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are

not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."); *id.* at 37 ("The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce.").

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the Federal Appellees is aware of one case that is related to the instant one within the meaning of 9th Cir. R. 28-2.6. The Plaintiffs-Appellants in *Natural Resources Defense Council et al. v. Salazar et al.*, 9th Cir. No. 09-17661, challenged the Bureau of Reclamation's entry into certain water delivery contracts following issuance of the 2005 BiOp that evaluated the combined operations of the CVP and SWP. *See also supra* at 12.

CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7) AND 9TH CIR. R. 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, the foregoing Brief for the Federal Appellees is proportionately spaced, has a typeface of 14 points more, and contains 13,998 words.

October 4, 2010
Date

/s
Charles R. Scott

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2010, I electronically filed the foregoing Federal Appellees' Answering Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

/s
Charles R. Scott

Addendum:

Excerpts from the Endangered Species Act

TABLE OF CONTENTS

§ 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

(Pub. L. 93–205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub. L. 96–159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97–304, § 9(a), Oct. 13, 1982, 96 Stat. 1426; Pub. L. 100–478, title I, § 1013(a), Oct. 7, 1988, 102 Stat. 2315.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b) and (c)(1), was in the original ''this Act'', meaning Pub. L. 93–205, Dec. 28, 1973, 81 Stat. 884, as amended, known as the ''Endangered Species Act of 1973'', which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

AMENDMENTS

1988—Subsec. (a)(4)(G). Pub. L. 100–478 substituted ''; and'' for period at end.

1982—Subsec. (c). Pub. L. 97–304 designated existing provisions as par. (1) and added par. (2).

1979—Subsec. (a)(5). Pub. L. 96–159 substituted ''wildlife, and plants'' for ''wildlife''.

EFFECTIVE DATE

Section 16 of Pub. L. 93–205 provided that: ''This Act [enacting this chapter, amending sections 460k–1, 460*l*–9, 668dd, 715i, 715s, 1362, 1371, 1372, and 1402 of this title and section 136 of Title 7, Agriculture, repealing sections 668aa to 668cc–6 of this title, and enacting provisions set out as notes under this section] shall take effect on the date of its enactment [Dec. 28, 1973].''

SHORT TITLE OF 1982 AMENDMENT

Section 1 of Pub. L. 97–304 provided: ''That this Act [amending this section and sections 1532, 1533, 1535, 1536, 1537a, 1538, 1539, 1540, and 1542 of this title and enacting provisions set out as notes under sections 1533, 1537a, and 1539 of this title] may be cited as the 'Endangered Species Act Amendments of 1982'.''

SHORT TITLE OF 1978 AMENDMENT

Pub. L. 95–632, § 1, Nov. 10, 1978, 92 Stat. 3751, provided: ''That this Act [amending sections 1532 to 1536, 1538 to 1540, and 1542 of this title] may be cited as the 'Endangered Species Act Amendments of 1978'.''

SHORT TITLE

Section 1 of Pub. L. 93–205 provided: ''That this Act [enacting this chapter, amending sections 460k–1, 460*l*–9, 668dd, 715i, 715s, 1362, 1371, 1372, and 1402 of this title and section 136 of Title 7, Agriculture, repealing sections 668aa to 668cc–6 of this title, and enacting provisions set out as notes under this section] may be cited as the 'Endangered Species Act of 1973'.''

RELATIONSHIP TO ENDANGERED SPECIES ACT OF 1973

Pub. L. 102–251, title III, § 305, Mar. 9, 1992, 106 Stat. 66, as amended by Pub. L. 104–208, div. A, title I, § 101(a) [title II, § 211(b)], Sept. 30, 1996, 110 Stat. 3009, 3009–41, provided that: ''The special areas defined in section 3(24) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802(24)) shall be considered places that are subject to the jurisdiction of the United States for the purposes of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).''

MINIMIZATION OF CONFLICTS WITH RECREATIONAL FISHERIES

For provision that all Federal agencies minimize conflicts between recreational fisheries and administration of this chapter, see Ex. Ord. No. 12962, § 4, June 7, 1995, 60 F.R. 30770, set out as a note under section 1801 of this title.

§ 1532. Definitions

For the purpose of this chapter—

(1) The term ''alternative courses of action'' means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term ''commercial activity'' means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided*, *however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms ''conserve'', ''conserving'', and ''conservation'' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term ''Convention'' means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term ''critical habitat'' for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term ''endangered species'' means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term ''Federal agency'' means any department, agency, or instrumentality of the United States.

(8) The term ''fish or wildlife'' means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term ''foreign commerce'' includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term ''import'' means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub. L. 97–304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term ''permit or license applicant'' means, when used with respect to an action of a Federal agency for which exemption is sought under section 1536 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action.

(13) The term ''person'' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term ''plant'' means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term ''Secretary'' means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term ''species'' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term ''State'' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term ''State agency'' means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term ''threatened species'' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term ''United States'', when used in a geographical context, includes all States.

(Pub. L. 93–205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub. L. 94–359, § 5, July 12, 1976, 90 Stat. 913; Pub. L. 95–632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub. L. 96–159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97–304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub. L. 100–478, title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

REFERENCES IN TEXT

The customs laws of the United States, referred to in par. (10), are classified generally to Title 19, Customs Duties.

Reorganization Plan Numbered 4 of 1970, referred to in par. (15), is Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

1988—Par. (13). Pub. L. 100–478, § 1001(a), amended par. (13) generally. Prior to amendment, par. (13) read as follows: ''The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.''

Par. (15). Pub. L. 100–478, § 1001(b), inserted ''also'' before ''means the Secretary of Agriculture''.

1982—Par. (11). Pub. L. 97–304 struck out par. (11) which defined ''irresolvable conflict'' as, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in section 1536(a) of this title, completion of such action would violate section 1536(a)(2) of this title.

1979—Par. (11). Pub. L. 96–159 substituted ''action would violate section 1536(a)(2) of this title'' for ''action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat''.

1978—Pars. (1) to (4). Pub. L. 95–632, § 2(1), (7), added par. (1) and redesignated former pars. (1) to (3) as (2) to (4), respectively. Former par. (4) redesignated (6).

Par. (5). Pub. L. 95–632, § 2(2), (7), added par. (5). Former par. (5) redesignated (8).

Par. (6). Pub. L. 95–632, § 2(7), redesignated former par. (4) as (6). Former par. (6) redesignated (9).

Par. (7). Pub. L. 95–632, § 2(3), (7), added par. (7). Former par. (7) redesignated (10).

Pars. (8) to (10). Pub. L. 95–632, § 2(7), redesignated former pars. (5) to (7) as (8) to (10), respectively. Former pars. (8) to (10) redesignated (13) to (15), respectively.

Pars. (11), (12). Pub. L. 95–632, § 2(4), (7), added pars. (11) and (12). Former pars. (11) and (12) redesignated (16) and (17), respectively.

Pars. (13) to (15). Pub. L. 95–632, § 2(7), redesignated former pars. (8) to (10) as (13) to (15), respectively. Former pars. (13) to (15) redesignated as (18) to (20), respectively.

Par. (16). Pub. L. 95–632, § 2(5), (7), redesignated former par. (11) as (16) and substituted ''and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature'' for ''and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature''. Former par. (16) redesignated (21).

Par. (17). Pub. L. 95–632, § 2(7), redesignated former par. (12) as (17).

Par. (18). Pub. L. 95–632, § 2(6), (7), redesignated former par. (13) as (18) and substituted ''fish, plant, or wildlife'' for ''fish or wildlife''.

Pars. (19) to (21). Pub. L. 95–632, § 2(7), redesignated pars. (14) to (16) as (19) to (21), respectively.

1976—Par. (1). Pub. L. 94–359 inserted '': *Provided, however*, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.'' after ''facilitating such buying and selling''.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

§ 1533. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior; who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species,

and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 1538 of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use

of the authority under paragraph 7[1] to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5 (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

[1] So in original. Probably should be paragraph ''(7)''.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases

The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as ''recovery plans'') for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable—

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan—

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) Monitoring

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section.

(2) The Secretary shall make prompt use of the authority under paragraph 7[2] of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

(Pub. L. 93–205, § 4, Dec. 28, 1973, 87 Stat. 886; Pub. L. 94–359, § 1, July 12, 1976, 90 Stat. 911; Pub. L. 95–632, §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; Pub. L. 96–159, § 3, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97–304, § 2(a), Oct. 13, 1982, 96 Stat. 1411; Pub. L. 100–478, title I, §§ 1002–1004, Oct. 7, 1988, 102 Stat. 2306, 2307; Pub. L. 108–136, div. A, title III, § 318, Nov. 24, 2003, 117 Stat. 1433.)

REFERENCES IN TEXT

Reorganization Plan Numbered 4 of 1970, referred to in subsec. (a)(2), is Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, which is set out in the Appendix to Title 5, Government Organization and Employees.

The Federal Advisory Committee Act, referred to in subsec. (f)(2), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5.

AMENDMENTS

2003—Subsec. (a)(3). Pub. L. 108–136, § 318(a), designated existing provisions as subpar. (A), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, and added subpar. (B).

Subsec. (b)(2). Pub. L. 108–136, § 318(b), inserted ''the impact on national security,'' after ''the economic impact,''.

1988—Subsec. (b)(3)(C)(iii). Pub. L. 100–478, § 1002(a), added subcl. (iii).

Subsec. (e). Pub. L. 100–478, § 1002(b), substituted ''regulation of commerce or taking,'' for ''regulation,'' in introductory provisions.

Subsec. (f). Pub. L. 100–478, § 1003, amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: ''The Secretary shall develop and implement plans (hereinafter in this subsection referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.''

Subsecs. (g) to (i). Pub. L. 100–478, § 1004, added subsec. (g) and redesignated former subsecs. (g) and (h) as (h) and (i), respectively.

[2] So in original. Probably should be paragraph ''(7)''.

shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 669b of this title, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

(Pub. L. 93–205, §6, Dec. 28, 1973, 87 Stat. 889; Pub. L. 95–212, Dec. 19, 1977, 91 Stat. 1493; Pub. L. 95–632, §10, Nov. 10, 1978, 92 Stat. 3762; Pub. L. 96–246, May 23, 1980, 94 Stat. 348; Pub. L. 97–304, §§3, 8(b), Oct. 13, 1982, 96 Stat. 1416, 1426; Pub. L. 100–478, title I, §1005, Oct. 7, 1988, 102 Stat. 2307.)

REFERENCES IN TEXT

The Sport Fishing Restoration Account established under section 1016 of the Act of July 18, 1984, referred to in subsec. (i)(1), probably means the Sport Fish Restoration Account established by section 9504(a)(2)(A) of Title 26, Internal Revenue Code, which section was enacted by section 1016(a) of Pub. L. 98–369, div. A, title X, July 18, 1984, 98 Stat. 1019.

AMENDMENTS

1988—Subsec. (d)(1). Pub. L. 100–478, §1005(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species. The Secretary shall make an allocation of appropriated funds to such States based on consideration of—

''(A) the international commitments of the United States to protect endangered species or threatened species;

''(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

''(C) the number of endangered species and threatened species within a State;

''(D) the potential for restoring endangered species and threatened species within a State; and

''(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species.

So much of any appropriated funds allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.''

Subsec. (i). Pub. L. 100–478, §1005(b), added subsec. (i).

1982—Subsec. (d)(2)(i). Pub. L. 97–304, §3(1), substituted ''75 percent'' for ''66⅔ per centum''.

Subsec. (d)(2)(ii). Pub. L. 97–304, §3(2), substituted ''90 percent'' for ''75 per centum''.

Subsec. (i). Pub. L. 97–304, §8(b), struck out subsec. (i) which authorized appropriations to carry out this section of $10,000,000 through the period ending Sept. 30, 1977, $12,000,000 for the period Oct. 1, 1977, through Sept. 30, 1980, and $12,000,000 for the period Oct. 1, 1980, through Sept. 30, 1982. See section 1542(b) of this title.

1980—Subsec. (i). Pub. L. 96–246 in par. (2) substituted ''$12,000,000'' for ''$16,000,000'' and ''1980'' for ''1981'', and added par. (3).

1978—Subsec. (c). Pub. L. 95–632 designated existing provision as par. (1), and in par. (1) as so designated, redesignated pars. (1) to (5) as subpars. (A) to (E), respectively, and subpars. (A) and (B) of subpar. (E), as so redesignated, as cls. (i) and (ii), respectively, substituted ''paragraph'' for ''subsection'' in provision preceding subpar. (A), as so redesignated, ''endangered or threatened species of fish or wildlife'' for ''endangered species or threatened species'' in subpar. (D), as so redesignated, ''subparagraphs (C), (D), and (E) of this paragraph'' for ''paragraphs (3), (4), and (5) of this subsection'' in cl. (i) of subpar. (E), as so redesignated, ''clause (i) and this clause'' for ''subparagraph (A) and this subparagraph'' in cl. (ii) of subpar. (E), as so redesignated, and added par. (2).

1977—Subsec. (c). Pub. L. 95–212, §1(1), inserted provisions that States in which the State fish and wildlife agencies do not possess the broad authority to conserve all resident species of fish and wildlife which the Secretary determines to be threatened or endangered may nevertheless qualify for cooperative agreement funds if they satisfy all other requirements and have plans to devote immediate attention to those species most urgently in need of conservation programs.

Subsec. (i). Pub. L. 95–212, §1(2), substituted provisions authorizing appropriations of $10,000,000 to cover the period ending Sept. 30, 1977, and $16,000,000 to cover the period beginning Oct. 1, 1977, and ending Sept. 30, 1981, for provisions authorizing appropriations of not to exceed $10,000,000 through the fiscal year ending June 30, 1977.

COOPERATIVE AGREEMENTS WITH STATES UNAFFECTED BY 1981 AMENDMENT OF MARINE MAMMAL PROTECTION ACT

Nothing in the amendment of section 1379 of this title by section 4(a) of Pub. L. 97–58 to be construed as affecting in any manner any cooperative agreement entered into by a State under subsec. (c) of this section before, on, or after Oct. 9, 1981, see section 4(b) of Pub. L. 97–58, set out as a note under section 1379 of this title.

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ''agency action'') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency

action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day

period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the ''Committee'').

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which

applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the ''exemption applicant'' in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term ''final agency action'' means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption

under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

***(l)* Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality**

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and

enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub. L. 93–205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub. L. 95–632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub. L. 96–159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub. L. 97–304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub. L. 99–659, title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3741, 3742; Pub. L. 100–707, title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

REFERENCES IN TEXT

The Privacy Act, referred to in subsec. (e)(7)(C), is probably a reference to section 552a of Title 5, Government Organization and Employees. See Short Title note set out under section 552a of Title 5.

The National Environmental Policy Act of 1969, referred to in subsec. (k), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Disaster Relief and Emergency Assistance Act, referred to in subsec. (p), is Pub. L. 93–288, May 22, 1974, 88 Stat. 143, as amended, known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which is classified principally to chapter 68 (§ 5121 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 5121 of Title 42 and Tables.

AMENDMENTS

1988—Subsec. (p). Pub. L. 100–707 substituted ''the Disaster Relief and Emergency Assistance Act'' for ''the Disaster Relief Act of 1974'' and ''section 405 or 406 of the Disaster Relief and Emergency Assistance Act'' for ''section 401 or 402 of the Disaster Relief Act of 1974''.

1986—Subsec. (b)(4)(C). Pub. L. 99–659, § 411(b)(1)–(3), added subpar. (C).

Subsec. (b)(4)(iii), (iv). Pub. L. 99–659, § 411(b)(4)–(6), added cl. (iii), redesignated former cl. (iii) as (iv), and in cl. (iv), as so redesignated, inserted reference to cl. (iii).

Subsec. (*o*). Pub. L. 99–659, § 411(c)(1), in introductory provisions, inserted '', sections 1371 and 1372 of this title,'', and substituted ''any'' for ''either'' after ''implement''.

Subsec. (*o*)(2). Pub. L. 99–659, § 411(c)(2), substituted ''subsection (b)(4)(iv)'' for ''subsection (b)(4)(iii)'' and inserted ''prohibited'' before ''taking of the species''.

1982—Subsec. (a)(3), (4). Pub. L. 97–304, § 4(a)(1), added par. (3) and redesignated former par. (3) as (4).

Subsec. (b). Pub. L. 97–304, § 4(a)(2), incorporated existing provisions into pars. (1)(A) and (3)(A) and added pars. (1)(B), (2), (3)(B), and (4).

developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

(Pub. L. 93–205, § 8A, as added Pub. L. 96–159, § 6(a)(1), Dec. 28, 1979, 93 Stat. 1228; amended Pub. L. 97–304, § 5[(a)], Oct. 13, 1983, 96 Stat. 1421.)

AMENDMENTS

1982—Subsec. (c). Pub. L. 97–304, § 5[(a)](1), designated existing provisions as par. (1) and added par. (2).

Subsec. (d). Pub. L. 97–304, § 5[(a)](2), substituted provisions relating to reservations by the United States under the Convention for provisions which had established an International Convention Advisory Commission and had provided for its membership, staffing, and operation.

Subsec. (e). Pub. L. 97–304, § 5[(a)](3), substituted provisions implementing the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere for provisions which had provided that the President shall designate those agencies of the Federal Government that shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.

EFFECTIVE DATE OF 1982 AMENDMENT

Section 5(b) of Pub. L. 97–304 provided that: ''The amendment made by paragraph (1) of subsection (a) [amending this section] shall take effect January 1, 1981.''

ABOLITION OF HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES

Committee on Merchant Marine and Fisheries of House of Representatives abolished and its jurisdiction transferred by House Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995. Committee on Merchant Marine and Fisheries of House of Representatives treated as referring to Committee on Resources of House of Representatives in case of provisions relating to fisheries, wildlife, international fishing agreements, marine affairs (including coastal zone management) except for measures relating to oil and other pollution of navigable waters, or oceanography by section 1(b)(3) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY; INTERIM PERFORMANCE OF FUNCTIONS OF COMMISSION

Section 6(b) of Pub. L. 96–159 provided that until such time as the Chairman, Members, and Executive Secretary of the International Convention Advisory Commission are appointed, but not later than 90 days after Dec. 28, 1979, the functions of the Commission be carried out by the Endangered Species Scientific Authority as established by Ex. Ord. No. 11911, formerly set out as a note under section 1537 of this title, with staff and administrative support being provided by the Secretary of the Interior as set forth in that Executive Order.

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any

fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a)(1) of this section shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

(A) such fish or wildlife is not an endangered species listed pursuant to section 1533 of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) In general

It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business—

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(2) Requirements

Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) Restriction on consideration of value or amount of African elephant ivory imported or exported

In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 1533 of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or

wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons, if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc–4(d)[1] of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in his section.

(Pub. L. 93–205, § 9, Dec. 28, 1973, 87 Stat. 893; Pub. L. 95–632, § 4, Nov. 10, 1978, 92 Stat. 3760; Pub. L. 97–304, § 9(b), Oct. 13, 1982, 96 Stat. 1426; Pub. L. 100–478, title I, § 1006, title II, § 2301, Oct. 7, 1988, 102 Stat. 2308, 2321; Pub. L. 100–653, title IX, § 905, Nov. 14, 1988, 102 Stat. 3835.)

REFERENCES IN TEXT

Section 668cc–4 of this title, referred to in subsec. (f)(2), was repealed by Pub. L. 93–205, § 14, Dec. 28, 1973, 87 Stat. 903.

AMENDMENTS

1988—Subsec. (a)(2)(B). Pub. L. 100–478, § 1006, amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: ''remove and reduce to possession any such species from areas under Federal jurisdiction;''.

Subsec. (d). Pub. L. 100–478, § 2301, amended subsec. (d) generally, revising and restating as pars. (1) to (4) provisions of former pars. (1) to (3).

Subsec. (d)(1)(A). Pub. L. 100–653 inserted ''or plants'' after ''purposes)''.

1982—Subsec. (a)(2)(B) to (E). Pub. L. 97–304, § 9(b)(1), added subpar. (B) and redesignated former subpars. (B), (C), and (D) as (C), (D), and (E), respectively.

Subsec. (b)(1). Pub. L. 97–304, § 9(b)(2), substituted ''The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection'' for ''The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on December 28, 1973, if the purposes of such holding are not contrary to the purposes of this chapter; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this section which occurs after a period of 180 days from December 28, 1973, there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on December 28, 1973''.

Subsec. (b)(2)(A). Pub. L. 97–304, § 9(b)(3), substituted ''The provisions of subsection (a)(1) of this section shall not apply to'' for ''This section shall not apply to'' in provisions preceding cl. (i).

1978—Subsec. (b). Pub. L. 95–632 designated existing provision as par. (1) and added par. (2).

HUMAN ACTIVITIES WITHIN PROXIMITY OF WHALES

Pub. L. 103–238, § 17, Apr. 30, 1994, 108 Stat. 559, provided that:

''(a) LAWFUL APPROACHES.—In waters of the United States surrounding the State of Hawaii, it is lawful for a person subject to the jurisdiction of the United States to approach, by any means other than an aircraft, no closer than 100 yards to a humpback whale, regardless of whether the approach is made in waters designated under section 222.31 of title 50, Code of Federal Regulations, as cow/calf waters.

''(b) TERMINATION OF LEGAL EFFECT OF CERTAIN REGULATIONS.—Subsection (b) of section 222.31 of title 50, Code of Federal Regulations, shall cease to be in force and effect.''

TERRITORIAL SEA OF UNITED STATES

For extension of territorial sea of United States, see Proc. No. 5928, set out as a note under section 1331 of Title 43, Public Lands.

§ 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

[1] See References in Text note below.